IN RE ARBITRATION BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 789

and

CUB FOODS

DECISION AND AWARD OF ARBITRATOR

FMCS CASE #0901015-50464-3

JEFFREY W. JACOBS

ARBITRATOR
7300 Metro Blvd. #300
Edina, MN 55439
Telephone 952-897-1707
E-mail: jjacobs@wilkersonhegna.com

April 3, 2009

IN RE ARBITRATION BETWEEN:

UFCW Local #789

and

DECISION AND AWARD OF ARBITRATOR
Peggy LeMay Grievance matter
FMCS Case # 091015-50464-3

Cub Foods.

APPEARANCES:

FOR THE UNION:	**FOR THE EMPLOYER:**
Roger Jensen, attorney for the Union	Paul Zech, attorney for the Employer
Peggy LeMay, grievant	Kevin Branstad, Store Director
Shirley Muelken, Business Representative	Lanesha Bryant, HR Representative
Ken Stoehr, Receiving Clerk	Danelle Franks, Associate Relations Representative
	Cheryl Johnson, Associate Relations Manager

PRELIMINARY STATEMENT

The hearing in the matter was held on February 16, 2009 at 9:30 a.m. at the Felhaber, Larson, Fenlon & Vogt in St. Paul, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on March 2, 2009. The parties also submitted a recent case and supplemental letter Briefs dated March 27, 2009 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement from March 5, 2008 through March 11, 2011. The grievance procedure is contained at Article 15. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties stipulated that there were no procedural issues and that the matter was properly before the arbitrator.

ISSUE

Did the Employer have just cause to terminate the grievant for her conduct on September 18, 2008? If not what shall the remedy be?

EMPLOYER'S POSITION

The Employer took the position that the grievant's termination was justified due to her unprofessional behavior and language at a meeting on September 18, 2008 and to her long record of issues related to her attitude and history of tardiness as set forth in the termination letter dated September 24, 2008. In support of this position the Employer made the following contentions:

1. The Employer acknowledged that the grievant is a long time employee of Cub and that her performance was satisfactory but noted that she has had severe problems with attendance over the years. The Employer pointed to a multitude of instances where she was late going back several years.

2. In addition, the grievant was verbally warned and coached about her tardiness but she persisted in being late on a relatively constant basis. In July of 2007, she was issued a formal written warning due to being late for work on no fewer than 48 occasions in just four months. This should have been sufficient to send a message to her that her tardiness would not be tolerated.

3. In January 2008 the Employer issued another written warning for being tardy another 30 times since July 2007. The Union stipulated to these facts and further stipulated that there were no grievances filed about either of these written warnings.

4. On September 6, 2008 the grievant was issued a one-day suspension because she was late another 14 times since the last written warning. The Employer made the point that despite her protestations to the contrary made during the hearing, there is nothing to suggest that her attendance will improve. She has been issued discipline on several occasions and her attendance has not improved at all.

5. Moreover, the grievant holds the title of Assistant Manager and supervises other employees. As such her actions set an example for the rest of the department. Her attendance issues can hardly be good for the morale of the rest of the employees especially since it has gone on for so long and occurs so often.

6. The Employer also noted that during the summer of 2008 the corporate offices became aware of a practice that allowed employees to change their schedule thus avoiding tardies and thus avoiding disciplinary consequences. They conducted an audit of the time keeping system and found that some 30 employees, both Union and non-Union were guilty of changing their schedules in this way. The grievant was among the employees who had engaged in this behavior.

7. The Employer alleged that this was not done to conform the posted schedule to her actual schedule but was rather done to change the schedule afterwards to avoid being shown as being late. The Employer pointed to several specific examples where the grievant changed her scheduled start time from 8:30 to 8:45 on dates when she punched in 1 or 2 minutes late. The Employer further notes that the policy of tardies is clear and requires a tardy even for one minute late. The Employer argued that her claim that the schedule should have been 8:45 was simply not credible and that the evidence shows that she was changing the schedule after the fact to avoid getting even more tardies.

8. The grievant served her one-day suspension and at about the same time she returned, had to be confronted with the results of the audit. The Employer determined that she should serve a two-day suspension as the result of her intentional actions to hide her tardiness by retroactively changing her schedule as outlined above.

9. Kevin Branstad, Store Director, and Ms. Lanesha Bryant, HR Representative, met with the grievant to discuss the suspension when the grievant engaged in a tirade that the Employer describes as disturbing. She yelled and used language that was profane and terribly offensive and disrespectful to the Store manager and to the Employer in general. She acknowledged yelling at Mr. Branstad, “You have no F ___ ing balls” “I have no respect for you” You need to get some F ___ ing balls.” The grievant also made statements that she intended to quit and that she “hated” her job. She then left the office in which they were meeting and ran into her office and closed the door.

10. Both Mr. Branstad and Ms. Bryant were shocked, even horrified by what they had just witnessed and been exposed to. They testified that the rant was audible to other employees who were in the area even though the door to the office was shut.

11. They then called the corporate HR department for guidance and were instructed to see if the grievant truly intended to quit. When asked if she would quit, the grievant said that she did not intend to quit but did intend to look for other work. After a suspension to investigate, the decision was made that the grievant's outburst was so violent and so disrespectful and severe that it warranted her termination.

12. The Employer cited a multiplicity of other arbitration decisions where employees who engaged in various acts similar in nature to the grievant's conduct were terminated. In several of those cases terminations were upheld for similar language, profanity and the like, and where the employees had demonstrated disrespectful and insubordinate behavior towards their supervisors. The Employer argued that in some of these cases, the conduct and profanity was far less offensive than what the grievant used here.

13. The Employer also cited precedent that supports the view that the Employer should set the proper penalty and that arbitrators should not then substitute their judgment for that of management. The Employer further asserted that the grievant had so poisoned the relationship between her and her Store Director that they simply could not work together after what she said to him.

14. At no point prior to the hearing has the grievant ever shown remorse for this tirade or for the terrible words she used, even though she has had several opportunities to do so. While she may have been directed not to say anything in the grievance meetings, she was confronted by Mr. Branstad and Ms. Bryant within a few minutes after the outburst in the grievant's office when they went there to ask if she truly had quit. She never offered any sort of apology then either. The Employer asserted that there is no valid reason to believe that she is sorry now for what she said and did that day.

15. The Employer also countered the Union's claim of disparate treatment and argued that the case cited by the Union is vastly different and does not constitute valid grounds for a disparate treatment claim. There was no evidence whatsoever that the Employer as treating the grievant differently when they initially met with her to impose the two-day suspension. In fact they had disciplined many other personnel for the same actions.

16. The Employer acknowledged that the grievant had been having personal difficulties during her tenure but asserted that this does not constitute grounds for reinstatement. The conduct she engaged in that day was so outrageous that no claim of "personal problems" should be countenanced. For one thing, the "stress" caused by the suspensions were directly related to the grievant's own unwillingness to get to work on time. The Employer also cited other cases where personal stress was found not to excuse the employee's conduct at work. The notion that somehow outside stressors should somehow excuse this must be rejected.

17. Finally, there is no reason to believe that her attendance problem will get better. There was not even a firm showing that all of these so-called outside stressors from which the grievant suffered that caused her to be late for work all the time in the first place have gone away. Thus the underlying reasons for her constant tardiness have not been shown to have gone away and that reinstatement under these circumstances will only insure a repeat in some fashion of the very scenario that unfolded on September 18, 2008.

The Employer seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION:

The Union took the position that there was not just cause for discharge and that while the grievant did lose her cool at the meeting there is no justification for the "industrial death penalty" in this matter. In support of this the Union made the following contentions:

1. The Union asserted that the grievant has been with the Employer for approximately 21 years and has been promoted several times and has received satisfactory to excellent performance reviews over the course of that time. In fact, on the very day she was given her one-day suspension, she received a performance evaluation from her store manager wherein she received the highest rating of all the Customer Service managers in the Cub Foods system throughout the country. See Union Exhibit 1.

2. The Union argued that if she had been truly changing the schedule to avoid tardies she would not have accumulated over 90 tardies in a little more than a year – she would have avoided far more than that. The totality of the evidence, according to the Union, shows that she was in fact changing the schedule to conform to her actual schedule. Further, the Union asserted that she was never made aware that this practice was prohibited since so many people did it.

3. Further, the grievant alleged that she told her supervisors of this practice and no one ever informed her that it was against a work rule, much less that it was a disciplinable offense If they had she would have stopped.

4. The Union further asserted that the Employer put the cart before the horse here by disciplining her and then requiring her to sign off on a new policy against the changing of the schedule. The standard for discipline is for the Employer to post and communicate a policy and only then discipline people for allegedly violating it. Here they did it exactly backwards.

5. The Union apparently filed grievances over the one-day suspension meted out for the tardiness issue and the two-day suspension meted out for the allegations regarding changing her schedule. The Union acknowledged though that if the arbitrator reinstates the grievant, the grievances over the one-day suspensions involved would be dropped.

6. The Union countered the claim by the Employer that arbitrators should "never" substitute their judgment for the penalty to be imposed except in cases that "shock the conscience." In fact many arbitrators reduce penalties and the Union further asserted that it is the proper role of the arbitrator in a discipline case to do so. Here, in fact the arbitrator was given the power to fashion a remedy and was thus specifically empowered to exercise the discretion to reduce the penalty if it appears reasonable to do so given the facts and circumstances of this case.

7. Here the Union argued that the Employer's action imposing the "industrial death penalty" was far too severe given her conduct. The Union asserted that the grievant was in fact very proud of her job and held it for more than 20 years. Her record, except for the tardiness problems is entirely clean and there is no reason to suspect that she would engage in the sort of behavior that led to her termination if she were to be reinstated.

8. More to the point, she was devastated by the suspensions and at the very moment she was feeling overwhelmed by these disciplinary actions; the first such actions that had even been taken against her in nearly 21 years of employment, she was under extraordinary stress outside of work. Her co-workers were aware of these issued as well. She had recently undergone a difficult divorce in which her former husband had threatened to kill her and himself. They were locked in a dispute about the sale of their home and the bank was foreclosing on the house during the middle of September 2008. The Union claimed that due to these unusual circumstances, the grievant found herself in the eye of a perfect storm of unfortunate events. The Union also asserted that the personal stress she was under at the time is largely in the past and that there is no reason to believe she would ever engage in this type of behavior in the future.

9. At the very moment she was feeling good about her evaluation, she got a suspension. Almost immediately upon returning and slowly getting over the devastation of that she got called into the office and was told she was going to get another suspension – one which she felt was unjustified since she had not ever been told not to engage in the conduct giving rise to it. She felt that her Store Director should have stood up for her instead of caving in. It was against this backdrop that she "went off" that day.

10. The Union further argued that the sole basis for the discharge was the outburst on October 18, 2008 when she was called into Mr. Branstad's office to discuss the suspension. Her termination letter recites the facts of the incident of September 18th as the basis for the termination. While the tardiness issue may be relevant to the question of remedy; it was not why she was fired.

11. The Union acknowledged that her language and actions were entirely inappropriate and that she should not have said what she did. However, at no time was there a threat made against anyone and no allegation of such. Neither was there any allegation that customers heard the outburst. Moreover, there was no actual evidence that other employees heard it; merely the opinion that they might have from the two people who were in the room with the grievant when this occurred. She was crying and crushed when this occurred and was in no position to threaten anyone.

12. The Union asserted that the essential feature of the cases that result in termination contain an element of a threat. Those where there is no such threat made typically result in the reinstatement of the employee. The Union cited to a publication from the ABA entitled *Discipline and Discharge in Arbitration* that provides essentially that an employee who verbally accosts a supervisor due to the pressures of the job a penalty less than discharge may be appropriate if the conduct does not constitute a threat of violence. Certainly there was not even the allegation of that here. The sole basis for the discharge was the language used.

13. The Union also pointed out that if the incident is shown to be isolated and there is no evidence of like behavior in the past or the likelihood of such behavior in the future arbitrators generally reinstate the employee. The Union also cited a number of cases, included several where very much the same sort of offensive language and worse was used, for this proposition.

14. The Union further asserted that arbitrators do in fact have the power to alter the discipline and that it is incumbent upon an arbitrator to review the penalty to assure that the appropriate penalty is imposed for the conduct involved in each case. Arbitrators are not to simply determine what the facts are and then rubber stamp whatever the Employer has decided to do. The very notion of industrial due process requires that arbitrators determine the penalty along with whether there was just cause for discipline – indeed the just cause analysis requires it.

15. The Union claimed that the grievant has been treated differently from similarly situated employees and cited to another employee who used offensive and even insubordinate behavior towards his supervisor, out on the shop floor even, and yet suffered no discipline at all. The Union brought forth another unit employee who had a heated conversation with Mr. Branstad in the presence of another employee about vacation. When asked whether he intended to take vacation to go deer hunting his angry response was "F___ you, F___ you, I work 40 plus weekends a year and need these off to go hunting." The employee indicated that he said this directly to Mr. Branstad and that it would have been difficult if not impossible for him not to have heard it. No discipline was meted out for this.

16. The essence of the Union's claim is that while the grievant acted inappropriately, the penalty was far too severe given her long and relatively clean disciplinary history, her exemplary performance record, the fact that there is nothing to indicate that she has acted out this way nor is she a risk to do so in the future.

The Union seeks an award reinstating the grievant with a suspension as deemed appropriate by the arbitrator.

MEMORANDUM AND DISCUSSION

The grievant was employed for approximately 21 years most recently as a Customer Service Manager at the Maplewood West store. Her performance evaluations have been quite good over time and at one point she received one of the highest ratings possible. See Union Exhibit 4. Her 2008 evaluation, given to her on the same day she was suspended, as discussed below, showed very high marks for her performance. See Union exhibit 1. There was no showing that she has had troubles with anger or her temper at any point in her employment.

She has had difficulty with attendance and tardiness however. There was little dispute that she has considerable difficulty getting to work on time and that her actions provide a bad example for the other employees in the store, including those working under her supervision. The grievant was verbally warned and coached about her tardiness but she persisted in being late on a relatively constant basis. In July 2007, she was issued a formal written warning due to being late for work on no fewer than 48 occasions in just four months.

In January 2008 the Employer issued her another written warning for being tardy another 30 times since July 2007. The Union stipulated to these facts and further stipulated that there were no grievances filed about either of these written warnings.

On September 6, 2008 the grievant was issued a one-day suspension because she was late another 14 times since the last written warning. This was grieved but the Union indicated at the hearing that the grievance over the 1-day suspension would be dropped if the grievant were to be reinstated on the grievance over the termination.

The record also showed that the Company became concerned that some employees, including manager, were changing their schedules to hide the fact that they were late. See Employer exhibits 5 and 6. The Employer asserted that the grievant, along with others, had been retroactively altering their schedules to make it appear that they were not late.

The Employer countered the claim that the grievant was merely adjusting the written record to conform to what her schedule really was by asserting that the written documents simply do not support that. The Employer further asserted that the grievant was well aware, as anyone should be, that changing the schedule after the fact is clearly contrary to well established and commonly known rules in this and virtually every workplace and that doing so is tantamount to altering one's time card.

The Employer issued the grievant a 2-day suspension for this. The evidence showed that the grievant was confronted with the audit findings at almost the same time she was returning from serving her 1-day suspension for tardiness referenced above. There was no evidence to suggest that the timing of this was anything other than coincidental nor was there evidence to suggest that the Employer was somehow deliberately timing this to "set the grievant off" or make her angry intentionally.

It was somewhat troubling that prior to the imposition of the 2-day suspension there was no attempt to ask the grievant why she changed the schedule or get her explanation for why she did. The evidence showed that she was called in and given the suspension without much more than that. Further, it was a bit troubling that there was no Union representative at the meeting and the evidence showed that the 2-day suspension was simply given to the grievant at the September 18th meeting.

The grievant indicated that she changed the written schedule to conform it to her actual schedule. This was hotly disputed at the hearing with the Employer arguing that the written record did not support the grievant's claim that there was somehow an error in her schedule and that she simply changed it. The Union's point was that if she had been truly trying to manipulate her schedule to avoid tardies, she would not have had so many tardies.

As Employer Exhibit 6 shows, her schedule was changed in very small increments in what did appear to be an attempt to change an 8:30 start time to 8:45. Given the totality of the evidence and the grievant's history, the more likely inference to be drawn her is that the grievant was late by a few minutes and was to start at 8:30 on several of these occasions and changed the schedule to make it appear that she was in fact several minutes early.

As above though, the Union indicated that if the grievant were to be reinstated it would drop the grievance over the 2-day suspension for altering her schedule. See page 8 of the Union's Brief herein. Based on this, it is not essential that much more time be spent on these two peripheral issues. As will be discussed more below, since the grievant never served those 2 days, those days too will be added onto the suspension imposed as the result of this Award.

As the parties indicated at the hearing, we are here for the outburst on September 18, 2008. The evidence and procedural posture of this matter shows that but for that incident the grievant would not have been terminated. More to the point, this matter is about what happened on September 18, 2008 when the grievant was confronted with the audit results and the 2-day suspension by her Store Manager and Ms. Bryant, the words she used and the actions she took at that time.

There were few factual disputes about what happened at the meeting. The grievant was called in to discuss the audit results and was told at that time she would be given a suspension. There was no Union representative there with her despite the fact that it was clearly a disciplinary meeting. There was insufficient evidence adduced at the hearing to show whether she asked for one or not. There was insufficient evidence to establish a Weingarten issue on these facts. Having said that however, a Union representative may well have been helpful in controlling what happened during this meeting.

The grievant acknowledged that she used very inappropriate language and simply lost her cool. She became upset at having received another suspension and accused her manager of not supporting her. She also disputed whether there was a rule in place that she was alleged to have violated. She shouted at her manager and the HR person, "You have no F ___ ing balls" "I have no respect for you" You need to get some F ___ ing balls." The grievant also made statements that she intended to quit and that she "hated" her job.

The evidence showed that she became very upset during this exchange and that she was crying for most of it. There was no evidence that Mr. Branstad or Ms. Bryant ever provoked this outburst. They acted professionally during the meeting. The grievant was simply overwhelmed by the whole ordeal and lost her temper. She retreated to her office and shut the door shortly after this exchange. The evidence further showed that she made no threats toward anyone nor was there ever any physical manifestation toward her manager or Ms. Bryant.

Finally, there was no direct evidence that anyone else heard this. There was evidence to show that the voices were quite loud but no witnesses testified other than Mr. Branstad and Ms. Bryant about the incident itself. There was no evidence that other employees or customers heard this exchange. It was held behind closed doors in an area away from the sales floor.

The question is thus whether under these facts and circumstances, the grievant's actions, which were clearly regrettable and inappropriate, warrant discharge. On these facts they do not.

Both sides cited arbitral precedent in support of their respective positions. While prior arbitrations between other parties are helpful they are of course not binding. For better or worse labor arbitrations are not typically subject to the concept of *stare decisis* especially where the parties and underlying facts are different.

The Employer argued first that once there has been a determination of guilt of the charges the arbitrator is constrained to impose the discipline as determined by the Employer and may not second-guess the level of discipline. This notion however does not find support either in the issue as posited by these parties in this case nor in arbitral precedent. Indeed, the very traditional notion of the "just cause" implies that a determination of the degree of punishment can and must be made.

In Arbitrator Carroll Daugherty's seminal decision regarding the determination of just cause, the last of the so-called 7 tests is whether "the punishment fits the crime." See, *Grief Bros Cooperage and UMW # 50*, 42 LA 555 (Daugherty 1964). It is incumbent upon an arbitrator to review each case on its unique facts to determine if the degree of discipline is appropriate given the facts. Thus, a review of the actual offense and the circumstances surrounding it, the grievant's record and the totality of circumstances must be done in order to properly decide whether there was just cause, as that term has evolved in the developing labor law, for the disciplinary action.

That determination is frankly all the more important in a termination case where someone's job and the possible integrity of the Company and the very relationships upon which the workplace depends. These are not easy cases and to suggest that the arbitrator must apply what the Employer did in a wooden fashion once the facts of the case have been determined and there has been shown to exist a violation of the Rules, is far too simplistic an analysis.

The Employer cited several arbitration decisions for the proposition that it is not for the arbitrator to substitute his or her judgment for that of the Employer. See, *Modine Mfg. Co*, 60 LA 141, 146-47 (Talent 1973). There the arbitrator found that "it is not for the arbitrator to substitute his judgment for that of the Company in assessing the degree of the penalty where the Company has not acted unreasonably, arbitrarily or capriciously. Reasonable men may differ and unless the penalty is unconscionable, it should not be disturbed." Despite that admonition however, the arbitrator in fact reviewed the penalty to determine if it met the standards of just cause. There on very different facts entirely, he found that the penalty in fact fit the crime. Thus, despite the ruling against substitution of judgment; he was poised to do just that.

Moreover, contrary to the holding of one arbitrator that it is "generally agreed" that arbitrators have no power to substitute their judgment for that of management and should only do so when the penalty shocks the conscience, see *Sandusky Cabinets*, 112 LA 373, 377 (Morgan 1999), that is frankly *not* the prevailing view among the vast majority of arbitrators.

Elkouri notes as follows: "the right of the arbitrator to change or modify penalties found to be improper or to severe may be deemed to be inherent in the arbitrator's power to decide the sufficiency of cause." See, Elkouri and Elkouri, *How Arbitration Works*, 5th Ed, p. 913, FN 140 and sources cited therein. See also, *Grief Bros. Cooperage, supra*. Elkouri cited Arbitrator Harry Platt in "*The Arbitration Process in the Settlement of Labor Disputes*," 31 J. Am. Judicial Society, 54, 58 (1947) as follows:

> In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide. This is not so under contracts or submission agreements which expressly prohibit an arbitrator from modifying or reducing a penalty if he finds that disciplinary action was justified, but most current labor agreements do not contain such limiting clauses. In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify the penalty if it is found to be improper or too severe, under al the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him."

Moreover, the parties gave specific direction to the arbitrator to fashion a remedy. At the outset the issue to be determined is whether there was just cause for the termination and if not what shall the remedy be. It is long established that the power to fashion a remedy is part and parcel of the determination in cases such as this.

To be sure any arbitrator must exercise discretion in changing the penalty and should be able to explain and justify the rational basis for doing so. There is still certainly meaning in the adage from the U.S. Supreme Court as stated in the Steelworker's Trilogy against dispensing one's own brand of industrial justice. However, to suggest that the arbitrator must determine that the penalty shocks the conscience or must apply an arbitrary or capricious measure to penalties overstates the case somewhat. Accordingly, as Arbitrator Platt alluded to, this case is as much about the appropriate penalty as about the factual basis for the discipline.

The parties each cited arbitral precedent in similar cases for their respective positions. As noted above these are not binding but do provide a framework for aiding the determination on these facts. The Employer cited *Reliant Steel Company*, 113 LA 816, 1999 WL 1423413 (Gentile 1999) in support of its claim that such profanity is dischargeable. There the arbitrator noted that the grievant, a 29 year employee, was terminated for his actions during a meeting to discuss a verbal warning for the use of his Walkie-Talkie. The arbitrator noted that "in the July 9, 1999 meeting, the grievant became derisive, abusive and insolent toward management, and if the management witnesses are credited, abusive of the Shop Steward as well. It was the grievant's demeanor, the tone of his comments and the content of what he said which triggered his termination." The grievant called his supervisor an "ass" and a "midget" and described the warning as a "bunch of S**t" and told management that they "could wipe my ass with the warning."

Significantly, he had been warned about this very kind of conduct approximately 6 months before. It should be noted that the arbitrator there also ruled that "the degree of discipline rests on a review of the Grievant's prior and relevant employment history. The 'just cause' standard calls for this once the triggering event has been established and proved." 113 LA at 816. The grievant's record revealed several prior warnings for abusive and profane language and insubordinate behavior. He had been issued a 3-day suspension for saying to his supervisor when his schedule was changed to "f**k you and the schedule." Id.

A few months before the incident in question, the grievant was warned about language and comments like this and was told specifically that he was "being insubordinate" and that he was "putting his job on the line." It was against this backdrop that the incident in July 1999 occurred when he told the manager to "wipe my ass with the warning."

The arbitrator reviewed the grievant's history and ruled that despite his long service, his long and somewhat colorful history of commentary like this, his discharge was justified. In fact the arbitrator assessed whether the grievant was remorseful in that case and found that he was hardly so. During a post-termination conversation between the grievant and the steward he simply said, "up yours" when discussing the grievance. The facts of the *Reliance Steel* case are thus vastly different from those presented here.

Here there was no such history. In fact the record showed quite the contrary; the grievant has never had any sort of outbursts like this, even when given the 1-day suspension a few weeks before, even though she testified that this too devastated her.

The Employer also cited *Everfresh Inc.*, 1991 WL 692919 (Allen 1999) where the arbitrator again upheld a discharge for abusive language used toward a supervisor. There however the charges that led to the grievant' discharge were gross misconduct, fighting and instigating or provoking a fight and failure or refusal to follow company policy. There were also physical acts, to wit, yelling at and following the supervisor to the lunchroom that the arbitrator found significant here as well. There was thus an element of actual threats of physical violence along with the verbal assault that was leveled at the supervisor. The grievant even made the statement, "I will get you" and "I will kill you" directed at the supervisor. The grievant allegedly also spit in the supervisor's face during the altercation, which took place over the course of many minutes and appeared to have been witnessed by other employees, although the opinion itself does not discuss this directly. This conclusion is based on the fact that the opinion made it clear that most of the incident occurred on the shop floor where presumably other employees were working. Further, when the grievant became very threatening the supervisor tried to leave the area and that eventually a security guard had to intervene to prevent physical violence. It goes without saying that this was a very different set of facts from those presented here and that the case is easily distinguishable.

Perhaps the case was presented to show that the mitigating factors presented by the grievant in *Everfresh* were not accepted by the arbitrator. The grievant asserted that he had recently suffered the loss of his mother and that his brother had been shot. The arbitrator found that these factors did not constitute sufficient mitigation for the actions he took that day. Frankly, if the grievant here had engaged in that kind of behavior the mitigating circumstances and other personal stressors she endured in the months leading up to the incident in this matter would not have saved her either. Of course she did not threaten anyone, the incident certainly did not take place on the sales floor or in some other area where other employees or customers could easily have heard it and she was the one who retreated. Moreover, there was no repeat of the same sort of verbal abuse that had at first occurred in the office; again a distinguishing factor.

The Employer also cited *Minnesota Community Development Agency and MN AFSCME Council 14, Local 551*, 1993 WL788512, MN BMS 93-PA-1702 (Imes 1993). There the arbitrator also sustained a discharge for the use of profane language directed at the supervisor. Without going into any more detail, the other significant factor is that the grievant, while telling the supervisor to "get the F**k out of here," also took out a can of mace and pointed it at the supervisor. Frankly, not much more space needs to be expended on that case in order to distinguish it from the facts presented here.

Likewise, in *Potash Co of America*, 40 LA 582 (1963) there appeared to be something of a pattern of the conduct and the arbitrator understandably ruled that an Employer is not "required to struggle with an employee interminably, and its right must be protected to terminate an employee who, by his total record, demonstrates his irresponsibility." Here there is no evidence to suggest that the grievant is likely to engage in such an outburst again.

Further, the Employer cited *University Hospitals of Cleveland*, 90 LA 131 (Strasshofer 1987) where the grievant was terminated for excessive absenteeism and tardiness. That case is simply inapposite to the current inquiry. While her record of attendance is suspect and, as will be discussed below, that had frankly better improve, a lot and in a hurry, that was not why she was fired. She was fired for the language used in the September 18, 2008 incident.

The Union cited several cases where, not surprisingly, the arbitrators either reinstated grievants for similar behavior or where a lesser penalty than discharge was imposed. The Union asserted that as a general proposition, if the outburst is isolated and not accompanied by verbal or physical threats and does not occur where customers, the general public or other employees are exposed to it, arbitrators are generally inclined to impose a far lesser penalty than termination.

In *King Soopers and UFCW Local 7*, 112 LA 491, WL 1059925 (Watkins 1998) the grievant was reinstated with a 30-day suspension for calling her superiors "prejudiced M___F___'s" and for talking to customers about her work related discipline. She had also been specifically warned not to use that type of language and not to discuss her work discipline with customers. The case is not germane to the question of these facts but is significant in that the arbitrator there engaged in the very sort of analysis of the penalty imposed and held that termination was too much for the proven charge. The grievant was merely suspended for the "M___F___" comment and that part of her grievance was denied and the suspension upheld.

Likewise, the case of *United States Graphite and UAW Local 537*, 113 LA 308, 1999 WL 978646 (Ellmann 1999) was not directly on point. That case involved statements made by the Union Steward during heated discussion on contractual matters. The grievant as a steward engaged in a discussion with management about possible grievance matters and used very salty language and at one point poked the superior in the chest. He was reinstated but this case is also distinguishable.

First, *U.S. Graphite* involved a steward. It has long been held that when a steward is acting in the official capacity of steward, the normal rules in place regarding employer/employee relationship do not apply. At that point the steward is on a par with the supervisor and can frankly use a different approach and more forceful language than that same person would while acting in their capacity as an employee of the Company. That appeared to be at least in some part, the basis of the decision in that matter. Thus, while the grievant was reinstated for actions and words that were at least as bad or worse (especially with regard to the physical poking) as the grievant's here, the case is different.

In *Stein, Inc and IUOE #18,* 114 LA 1374, 2000 WL 1545071 (Shanker 2000) the arbitrator reinstated the grievant where he used foul language and refused an assignment that made him claustrophobic and afraid for his life. The opinion did not go into detail about the actual language used but did reference that he used foul, abusive and obscene language that went beyond mere "shop talk." The arbitrator reinstated the grievant without back pay citing the mitigating factors of his health concerns.

Finally, the parties cited a recent case involving these same two parties in support of their respective arguments. See, *Cub Foods and UFCW Local 789,* (Mike Brost – grievant), FMCS case No. 08-05-20-56309-3, (Powers 2009). There the grievant's discharge was upheld by the arbitrator. The Employer asserted that his conduct was similar in that he also used profane language toward a supervisor in an incident that took place in May of 2008, only a few months prior to the incident involved in this case. After a bit of a heated exchange between the grievant and his supervisor, in which the supervisor allegedly called him a derogatory name and in which he called her one as well, the grievant said F___ Y___ to the supervisor several times. There was convincing testimony that the grievant "started" the incident without provocation from the supervisor and that even thought the supervisor escalated the incident with some of her comments the grievant instigated the whole affair.

The Employer further argued that the grievant's conduct in swearing at a supervisor in an unprovoked manner is similar in nature to the very conduct the grievant exhibited here and should be similarly treated. Moreover, the Employer argued, that to demonstrate the seriousness with which Cub Foods takes this kind of transgression, they disciplined the supervisor as well since she also used some abusive language in this incident. While she was not fired, her actions were also in violation of the Employer's clear policy against this kind of language. Here, since the grievant provoked this incident, used awful language and since the supervisor never engaged in this kind of behavior or retaliated in any way, the result should be the same.

The Union on the other hand argued that there are several very striking differences between the two cases. As noted by the arbitrator, [the grievant] has had many opportunities to get his temper under control. He was referred to re-training on at least four occasions and referred to the employee assistance program for anger management as well. He was subjected to progressive discipline, having at least a written warning and a suspension prior to his termination." Indeed, the statement of the facts showed that the grievant was given a written warning in March 2005 and a suspension in July 2005 both for inappropriate behavior at work. He was referred to employee assistance for pushing another employee and swearing within hearing of customers. The arbitrator even noted that the grievant had been warned that another incident like that would result in his termination. The Union asserted that these acts demonstrate the stark difference between the two cases. Here Ms. LeMay has never exhibited this type of behavior before and there is no reason to believe she will ever do so in the future.

The Union argued that there were vast differences in the incident as well. The grievant in Brost swore on multiple occasions during the May 10, 2008 incident and was so agitated that the female supervisor gave credible testimony that she feared for her safety and sought another supervisor to end the incident. The supervisor told management that "one of us needs to leave." Thus there was an element of a physical threat involved in that case that were clearly not present here.

Moreover, other employees who had nothing to do with the conversation between Brost and his supervisor witnessed the incident, which also presents a distinguishing factor. While Ms. Bryant was there and certainly heard the comments, she was an integral part of the meeting and was there to give the suspension notice to the grievant. She was not an innocent bystander or another employee who just happened by.

The Union argued too that the fact that the supervisor was given only a written warning implies an element of disparate treatment here. The supervisor in the Brost case called the grievant a "chauvinist pig" and also used the F word in that incident. In fact other employees heard that exchange as well. Without knowing more about the case from what appears in the decision it is difficult to determine whether the written warning given to the supervisor actually constitutes disparate treatment. There was no showing of what her prior record was or what all of the facts were. The question here is whether this grievant was the subject of disparate treatment and on this record that cannot be determined *per se*. What is apparent, as will be discussed below, is that the discipline was far too harsh given the totality of the evidence.

It was clear to Arbitrator Powers that the grievant before her had engaged in this type of behavior on several occasions in the past. He had been disciplined for it before and given opportunities to deal with it through employee assistance and anger management classes. No such opportunity was provided to Ms. LeMay. In Brost there was again an element of a threat, so much so that the supervisor retreated to find someone in management to help her diffuse the situation. There was even an element not present here, that the grievant in Brost resumed his tirade even after the supervisor had returned. Here no such facts were present. It was noted that the grievant here had the chance to apologize for her behavior when the Store Manager and the HR person went to her office to find out whether she indeed intended to quit but failure to apologize is vastly different from resuming the same sort of abusive behavior. There was no history of this kind of behavior in this matter and no reason to suggest that there is a substantial likelihood of it occurring in the future.

Having said that however, the Brost case underscores the need to make clear to the grievant that this kind of behavior cannot recur. The arbitrator there ruled that repeated outbursts and incidents of insubordinate and inappropriate behavior will be treated harshly and that a discharge will be sustained if this sort of behavior occurs again. Obviously future results will depend on future facts but the Brost matter stands as a stark warning about the consequences of such actions in the future.

Eventually however this case comes down to a discussion not of what other arbitrators think about different facts but what this arbitrator thinks of these facts. As noted here, the general sense among arbitrators in cases like this, is that if the outburst appears isolated, is not accompanied by threats of any kind and there are facts to demonstrate that the outburst is unlikely to recur, the result is likely to be less than discharge. Several things are clear here. The grievant's actions on September 18, 2008 were out of line and she acknowledged that at the hearing and appeared very contrite about it and showed genuine remorse for getting angry and out of control like that. She was under considerable stress due to her divorce and other matters outside of the workplace but those would not have helped her here. For one thing, there was very little evidence that the supervisor knew the details of that or would have had any reason to know that she might lose control like that. Accordingly, that alone would not have saved the grievant’s job on this record.

What did was the fact that she has never in all her years done anything like this before. There were no threats of any kind and while the words used were insulting and disrespectful to be sure one simply does not throw away an entire career of more than 20 years based on this one angry incident. There were no threats made or even implied in this entire incident. As noted above, while it is not a prerequisite, it appears that the presence or absence of any sort of threat is a significant factor in the decision to terminate or not.

There was no evidence that any customers or other employees heard this. The Employer asserted that other employees may have heard the commotion and may have even heard the words used but no direct evidence of that was presented and none can be assumed. The incident took place in the office away from the sales floor and no witnesses testified about any other people who heard the incident other than the Store manager, Ms. Bryant and the grievant herself. This too is a significant factor to be taken into account.

Clearly, any time an employee is given discipline the person giving that out might expect some resistance to that, especially given the nature of these allegations and every manager understands that. Thus, while the seeming shock of the grievant's reaction to this was understandable, it was not totally out of the realm of possibility that some colorful language might be used.

Further, while neither side raised this as a major issue, the Employer's rules do not require that this be a terminable offense. The Employer's Handbook on Professional behavior, Employer Exhibit 11, provides that "to respect our customers and coworkers we need to provide a professional environment. Listed below are guidelines to be followed by all Cub Foods Associates. Violating these policies will result in disciplinary action, up to and including termination. … 11. Profanity or vulgar language is prohibited and is not to be used in any area of the store building, the sales floor, offices, break room backrooms or in the parking lot." As the incident with the other employee showed though, course language is used on occasion and did not result in his termination. Indeed, the F word was used twice in that incident without any discipline being meted out at all.

The Labor Agreement further provides at Article 10 DISCHARGE as follows: "In all instances of discipline, except where grounds are sufficient to constitute just cause for immediate discharge, the Employer will give the employee at least one (1) warning notice in writing, with a copy to the Union." There was no evidence as to what constituted "grounds … sufficient to constitute just cause for immediate discharge," on this record.

There was no prior written warning given to the grievant here but even if the rule against the use of vulgar language is applied, that rule by its own terms does not require immediate discharge for a first offense. Having said that however, no one condones this sort of behavior or language, including the Union and the grievant. The question is what to do on these facts.

As noted above, the facts of this case do not rise to the level of a dischargeable offense. Moreover, despite the Store manager's understandable reticence in working with the grievant, it is assumed that professional people can act professionally around each other and that reinstatement will not result in this type of behavior in the future.

Further, while the arbitrator too has some reservations about the grievant's ability to get to work on time, that cannot be addressed here; the question here is whether there was just cause to discharge her for the incidents in question. While arbitrators should not be blind to the consequences of their decisions, the attendance problem will work itself out one way or the other. Either the grievant will make the effort to get to work on time per her schedule, in which case that problem will be behind her, or she will not in which case the Employer may well take further disciplinary action against her. It was clear she understands that and nothing in this decision should be read as minimizing that issue.

Finally, the Employer raised one tangential issue at the hearing that was considered but did not weigh heavily on the decision to reinstate the grievant. The fact that the grievant is now married to another store director makes the relationship somewhat more difficult but arbitrators cannot be swayed by the marital status of a grievant. The notion of just cause and the appropriate determination of discipline and the remedy to be imposed does not depend on such outside factors. These facts do not warrant a reconsideration of the decision to impose a lesser penalty than discharge on these facts.

The question of the appropriate remedy was given considerable thought. Several options were considered and her attendance history was considered along with the seriousness of her outburst involved here. Reinstatement with full back pay and benefits was almost immediately rejected because of the seriousness of her actions and the language used to her Store Manager.

Reinstatement without any back pay was likewise considered but rejected given the mitigating factors discussed above; i.e. that there was no threat of any kind, she showed remorse for her actions and that there is little likelihood of this recurring. Reinstatement with some back pay is always problematic since it is subjective and further involves the payment by the Employer of pay for a time when the employee was not working. That however is the nature of the process. While there are times when reinstatement without back pay or benefits is an appropriate remedy, arbitrators should be mindful of the fact that what it amounts to is a long suspension that likely would not have been meted out by the Employer in the first place (especially incases where may months have passed between the initial action and the arbitration hearing).

The Union's acknowledgement that the grievant's actions were inappropriate and the request that she be given at least some form of discipline were well taken. Her record of tardies and the prior suspensions she has been given were taken into account here as well. While such determinations are far from scientific, discipline should be sufficient to "get the person's attention," while at the same time providing a measure of education as to the seriousness of a given offense in the context of the overall record and the totality of the circumstances.

Accordingly, given her history and the seriousness of the offense, a reinstatement with back pay and benefits less a 20-day disciplinary suspension is warranted. This takes account of the fact that her job performance has generally been quite good and that her record, while long, is not completely free of discipline. It further takes account of the need to impress upon the grievant that such outbursts should not recur in the future and the seriousness of the consequences if they do.

As noted above, the grievant apparently never actually served the 2-day suspension that gave rise to this whole matter. That too is to be deducted from the back pay awarded as the result of this decision in addition to the deduction for the 20-day suspension imposed herein.

AWARD

The Grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated to her former position within five (5) business days of this Award with full back pay and accrued contractual benefits less the 20-day disciplinary suspension as set forth above. Further, the back pay awarded is to be mitigated by an unemployment compensation or other governmental wage replacement benefits received, wages or salary earned at alternate employment between her termination and her reinstatement herein. Finally, as set forth above, the grievant's back pay and benefits are also to be subject to the 2-day suspension that was to be imposed herein but not served.

Dated: April 3, 2009
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Jeffrey W. Jacobs, arbitrator